

Part 771 -- Employee Grievance

(Deleted material is shown in brackets; added material is underscored.)

771.105 Presentation of a grievance.

(c) The agency shall have the right :

(1) to disallow the employee's choice of another agency employee as his representative if that choice conflicts with priority needs of the Government or would give rise to unreasonable costs to the Government; and

(2) to challenge any selection the employee makes with regard to a representative on the grounds of conflict of interest or conflict of position.

(d) The agency grievance system shall provide procedures for resolving agency challenges to an employee's choice of representative at an early stage in the grievance proceeding.

Chapter 771 Employee Grievance

Subchapter 1 General Provisions

(Deleted material is shown in brackets; added material is underscored.)

1.5 Representation

An employee has a right to present a grievance without representation. He also has the right to be accompanied, represented, and advised by a representative [of his choice] at any stage of the proceeding. An employee may change his representative but to do so he should notify the agency of the change in writing. [A person chosen by the employee as his representative must be willing to represent him. In addition, he must be free to do so, e.g., not be disqualified because of conflict of position or unavailable to serve in that capacity because of priority needs of the service or unreasonable cost to the Government.] The representative may be another employee in the Federal service or he may be outside the Federal service.

A person chosen by the employee as his representative must be willing to represent him. In addition, he must be free to do so, e. g., he must not be disqualified because of priority needs of the service or unreasonable cost to the Government. An agency may challenge the employee's choice of representative on the grounds of conflict of position or conflict of interest. Conflict of position refers to an incompatibility between the representation function and an employee's official duties. For example, a personnel officer should not serve as the grievant's representative in a case concerning a personnel action over which he has control, in which he has participated, or of which he has special knowledge by virtue of

-2-

his assigned duties. Conflict of interest can take many forms.
One example would be for a supervisor or other employee who may not
be included in a bargaining unit, pursuant to E.O. 11491, as amended,
to be represented by an official of a labor organization that represents
or has pending a petition to represent employees under his direction or
control or with whom he has substantial contact and dealings, or by an
officer of an association, federation, or council with which such a labor
organization is affiliated.

The agency grievance system shall provide for the resolution of any
challenge regarding the grievant's choice of representative at an early
stage in the grievance procedure. In the event the grievant changes his
representative during the proceeding, any challenge regarding the new
representative should be taken up and resolved as soon as possible
following the notification of a change in representative.

Part 772 -- Appeals to the Commission

(Deleted material is shown in brackets; added material is underscored.)

772.307 Hearings

(c) Hearing procedures. (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by a representative. The agency is also entitled to participate in the hearing. Although normally an appellant may choose anyone he wishes to represent him, the agency may challenge the appellant's choice of representative on the grounds of conflict of position or conflict of interest. Such a challenge must be made during the earliest stage of the proceeding and must be disposed of before consideration of the merits of the case. If the appellant changes his representative during the course of the proceeding, the agency will be given an opportunity to challenge his new selection. There shall be no interlocutory appeals from the appeals officer's determination with regard to a challenge to the appellant's choice of representative. [Both parties are entitled to produce witnesses. The Appeals Authority is not authorized to subpoena witnesses.]

(2) Both parties are entitled to produce witnesses. The Appeals Authority is not authorized to subpoena witnesses. Any agency that has employees entitled to appeal to the Appeals Authority under this part shall make its employees available as witnesses at the hearing when requested by the Appeals Authority after consideration of a request by the appellant or the agency, unless it is administratively impracticable to comply with the request of the Appeals Authority. If the agency determines that it is not administratively practicable to comply with the request of the Appeals Authority, it shall submit to the Appeals Authority its written

reasons for the declination. If the reason for the declination is adequate, the Appeals Officer shall insert the explanation in the record, notify the appellant that his request for the witness(es) has been denied and provide the appellant with the reason for the denial.

If the appeals officer deems the reason inadequate, then any testimony that might have been rebutted by the missing witness(es) may be interpreted in the light most favorable to the appellant. In the event that a witness is no longer employed by the appellant's agency, but is employed by a Federal agency, the witness shall be made available by the currently employing agency with appropriate reimbursement by the appellant's agency, unless the Appeals Authority concurs in a determination of administrative impracticability. Employees [of the agency] shall be in a duty status during the time they are made available as witnesses. Employees [of the agency] shall be free from restraint, interference, coercion, discrimination or reprisal in presenting their testimony.

Chapter 772 -- Appeals to the Commission

Subchapter 3 Commission's Appellate Review of Actions Against Employees

(Deleted material is shown in brackets; added material is underscored.)

3.2 Appellate Review Procedures.

c. Representation. Any appellant may designate in writing a person [of his choice] to represent him in the presentation of his appeal.

That person must be willing to represent him and must be free to do so e.g., not disqualified because of conflict of position or interest, or unavailable to serve in that capacity because of priority needs of the Government or unreasonable costs to the Government. A veteran may designate a service organization recognized by the Commission under subpart A of part 990 of the civil service regulations to represent him in the presentation of his appeal.

h. Hearings.

(1) An employee has a right to appear at the hearing on his appeal, personally or through or accompanied by his representative. The agency also has a right to participate in the hearing. Although normally an appellant may choose anyone he wishes to represent him, the agency may challenge the appellant's choice of representative on the grounds of conflict of position or conflict of interest. Conflict of position refers to an incompatibility between the representation function and the designated person's official duties. For example, a personnel officer should not serve as the appellant's representative in a case concerning a personnel action over which he has control, in which he has participated, or of which he has special knowledge by virtue of his assigned duties. Conflict of interest can take many forms. One example, would be for a supervisor or other employee who may not be included in a bargaining unit pursuant to E.O. 11491, as amended, to be represented by an

-2-

official of a labor organization that represents or has pending a petition to represent employees under his direction or control or with whom he has substantial contact and dealings, or by an officer of an association, federation, or council with which such a labor organization is affiliated.

[Both parties have the right to produce witnesses. The Commission is not authorized to subpoena witnesses for these proceedings.]

(2) Both parties have the right to produce witnesses. The Commission is not authorized to subpoena witnesses for these proceedings. An agency shall make its employees available as witnesses at the hearing when (a) requested to do so by the Commission after consideration of a request by the appellant or the agency, and (b) unless it is administratively impracticable for the agency to comply with the Commission's request. If the agency determines that it is not administratively practicable to make available the employees requested by the Commission, it shall give the Commission its written reasons for this determination. Federal employees are in duty status during time they are made available as witnesses. Such employees shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(3) Hearings will be conducted by a representative of the Commission (hereinafter called the [examiner] appeals officer). Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee, his designated representative, representatives of the agency, and witnesses) and for cross-examination of witnesses. The testimony shall be under oath or affirmation. Rules of evidence will not be

-3-

strictly applied, but the examiner appeals officer shall use reasonable discretion to exclude irrelevant or unduly repetitive testimony. Any challenge to the appellant's choice of representative must be made and disposed of before consideration of the merits of the case. The appeals officer will hear presentations from both sides and will make a determination on the issue. If the appellant changes his representative during the course of the proceeding, the agency will be given an opportunity to challenge the new selection. In the event that the appellant's choice of representative (either the original or a subsequent choice) is disallowed, the proceeding will be recessed to allow the appellant to secure alternative representation.